

STATE OF MICHIGAN
COURT OF APPEALS

MICHELLE A. KONIECZNY,

Plaintiff-Appellee,

v

MERCY MOUNT CLEMENS CORPORATION,
d/b/a ST. JOSEPH'S MERCY OF MACOMB,

Defendant-Appellant.

UNPUBLISHED

July 14, 2005

No. 260045

Macomb Circuit Court

LC No. 2003-005741-NZ

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Plaintiff, an obstetrician and gynecologist, worked for defendant from 1999 to 2002 and was subject to a non-compete clause as a condition of her employment. The clause prohibited plaintiff from engaging in her specialty within a ten-mile radius of defendant's location for a period of two years after her employment with defendant ended. Plaintiff alleges that after she left her employment with defendant, she was offered a position at a nearby location, but was unable to accept the position because of the non-compete clause. She subsequently commenced this action against defendant for gender discrimination under the Michigan Civil Rights Act, MCL 37.2101 *et seq.*, alleging that only female physicians in her department were required to agree to a non-compete clause with a ten-mile work restriction, whereas male doctors were offered non-compete clauses with a five-mile work restriction. The parties filed cross-motions for summary disposition. The trial court denied the motions. This Court granted defendant's application for leave to appeal. We reverse and remand.

In its motion for summary disposition, defendant argued that plaintiff failed to prove a prima facie case of discrimination. This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendant moved for summary disposition under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

A prima facie case of discrimination under the Civil Rights Act can be proven under either a disparate impact or disparate treatment theory.

Disparate treatment requires a showing of either intentional discrimination against protected employees or against an individual plaintiff. Disparate impact requires a showing that an otherwise facially neutral employment policy has a discriminatory effect on members of a protected class. [*Duranceau v Alpena Power Co*, 250 Mich App 179, 182; 646 NW2d 872 (2002).]

To prove gender discrimination, plaintiff must show that she was "(1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct." *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997).

Plaintiff relies on the test from *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). Under that test, a plaintiff may establish a prima facie case of discrimination by showing that she suffered an adverse employment action under circumstances that give rise to an inference of unlawful discrimination. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999). Once a prima facie case is established, the employer has the burden of coming forward with a legitimate nondiscriminatory reason for the adverse employment action. *Id.* If the employer meets that burden, the plaintiff then must prove that the stated reason is a mere pretext for discrimination. *Id.*

We agree with defendant that plaintiff failed to establish a prima facie case of discrimination under a disparate treatment theory. In particular, plaintiff failed to show that similarly situated male employees were treated more favorably. *Town, supra* at 695. To create an inference of disparate treatment and show that male employees were similarly situated, the plaintiff must show that all relevant aspects of her employment situation were nearly identical to those of her male co-workers. *Id.* at 699-700. The burden is on the plaintiff to show that other employees were similarly situated. The defendant is not required to offer proof of dissimilarity. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 178 n 28; 579 NW2d 906 (1998).

We agree with defendant that plaintiff failed to show that her five male co-workers, also ob/gyns, were similarly situated. Although the male ob/gyns had more favorable non-compete clauses in their employment agreements with defendant, the evidence establishes that their experience and work histories, and the length of their contracts, were not nearly identical to plaintiff's work history or length of contract. In contrast to plaintiff, the male ob/gyns all had more experience than plaintiff. Some also agreed to longer terms of employment with defendant. Given the dissimilar circumstances of these individuals, they cannot be compared to plaintiff to allow a factfinder to infer a discriminatory intent. *Town, supra* at 699-700. Because plaintiff could not prove this element of her prima facie case, the trial court erred in not granting defendant's motion for summary disposition on plaintiff's disparate treatment theory.

We also agree with defendant that the trial court erred in not granting summary disposition of plaintiff's claim under a disparate impact theory. To prove disparate impact, a plaintiff must show that an otherwise facially neutral employment policy has a discriminatory effect on members of a protected class. *Lytle, supra* at 177 n 26. However, the plaintiff need not prove that the defendant intended to discriminate in order to prevail under this theory. *Donajkowski v Alpena Power Co*, 219 Mich App 441, 450-451; 556 NW2d 876 (1996), aff'd 460 Mich 243; 596 NW2d 574 (1999).

For her disparate impact claim, plaintiff again compares herself to her male co-workers, who received more favorable non-compete agreements. To support her disparate impact claim, plaintiff relied on statistical differences between male and female ob/gyns.

We conclude that plaintiff cannot prove a disparate impact claim based upon her statistical evidence because she has not shown that the disparity between the treatment of male and female ob/gyns is not due to nondiscriminatory reasons. As previously indicated, plaintiff's male co-workers had more experience and were willing to work for longer terms than plaintiff. The disparity between these two groups makes a statistical comparison between them insufficient to prove discrimination. Similarly, the size of the sample is too small to infer discrimination. See *Pollis v The New School for Social Research*, 132 F3d 115, 121 (CA 2, 1997); *Tinker v Sears, Roebuck & Co*, 127 F3d 519, 524 (CA 6, 1997).

Because plaintiff failed to prove a prima facie case of discrimination under either a disparate treatment or disparate impact theory, the trial court erred in denying defendant's motion for summary disposition. We reverse and remand for entry of judgment in favor of defendant. In light of our decision, we need not address defendant's remaining arguments.

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Pat M. Donofrio